STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 21, 2013
v	No. 310193 Livingston Circuit Court
SANDY RUSSELL GLOVER a/k/a SANDY RUSSEL GLOVER a/k/a SANDY ALEXANDER GLOVER, Defendant-Appellant.	LC No. 00-011454-FC

Before: HOEKSTRA, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and malicious destruction of property[1]. He was sentenced as a habitual offender, second offense, MCL 769.10, to serve 6 to 15 years in prison for the assault conviction and 90 days in jail for the malicious destruction of property conviction. Defendant appeals as of right.[2] For the reasons set forth, we affirm defendant's convictions, but vacate his sentence and remand for resentencing and correction of the judgment of sentence.

I. HABITUAL OFFENDER

Defendant first argues that the trial court erred in sentencing him as a habitual offender because the prosecution did not timely file its notice of intent to seek sentence enhancement. We

[1] The judgment of sentence indicates that defendant was convicted of malicious destruction of property, value between $200 and $1,000, MCL 750.377a(1)(c)(*i*), but he was actually convicted of malicious destruction of property, value less than $200, MCL 750.377a(1)(d).

[2] In *Glover v Palmer*, unpublished order of the United States District Court for the Eastern District of Michigan, issued May 3, 2012 (Docket No. 07-11305), the court, pursuant to a remand order from the United States Court of Appeals for the Sixth Circuit, *Glover v Palmer*, 464 Fed Appx 454, 456 (CA 6, 2012), issued a conditional writ directing the State to provide defendant with a direct appeal because he had previously received ineffective assistance of appellate counsel.

agree. We review this unpreserved issue for plain error. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). In order to prevail, defendant must show that (1) error occurred, (2) the error was plain, and (3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

At the time relevant to this case, MCL 769.13(1) read in relevant part as follows:

> In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, *if arraignment is waived, within 21 days after the filing of the information charging the underlying offense*. [1994 PA 110 (emphasis added).]

The prosecution was required to strictly comply with the 21-day notice period for filing a notice of intent to seek sentence enhancement. *People v Morales*, 240 Mich App 571, 575-576; 618 NW2d 10 (2000). In *Morales*, this Court emphasized that "a strict application of the twenty-one day rule" was imposed by the plain language of the statute and relevant caselaw. *Id*. at 576. Moreover, in *People v Ellis*, 224 Mich App 752; 569 NW2d 917 (1997), this Court stated that 1994 PA 110 "reflects a bright-line test for determining whether a prosecutor has filed a supplemental information 'promptly.'"[3] *Id*. at 755. When a prosecution's written notice of intent is untimely under 1994 PA 110, the proper remedy is to vacate the enhanced sentence as an habitual offender and remand for resentencing without the habitual offender enhancement. *Morales*, 240 Mich App at 586.

In this case, the information was filed on January 4, 2000, and defendant waived arraignment on the same day. Because defendant waived arraignment, under subsection (1) of 1994 PA 110 (i.e., MCL 769.13(1)), the prosecution was required to file a written notice of intent to seek sentence enhancement within 21 days after the information was filed (January 25, 2000). See *Morales*, 240 Mich App at 574-575. However, the prosecution did not file the written notice of intent until January 28, 2000. Because the prosecution's written notice of intent was untimely under 1994 PA 110, the trial court erred in sentencing defendant as a habitual offender.

This error was "plain" because calculating whether a 21-day notice period is satisfied is clear and obvious. See *Carines*, 460 Mich at 763. The error also affected defendant's "substantial rights" because he received a longer sentence with the habitual offender enhancement than he would have otherwise received. See *id*. Because the trial court committed

[3] A supplemental information performs the same function as a habitual offender notice. See, e.g., *Morales*, 240 Mich App at 583 (explaining that with the enactment of 1994 PA 110, a prosecutor was allowed to provide notice of sentence enhancement through a written notice of intent, rather than through a supplemental information).

plain error affecting substantial rights, defendant is entitled to resentencing without the habitual offender enhancement.[4]

II. WARRANTLESS ENTRY

Defendant argues that he received ineffective assistance of counsel because defense counsel failed to move to suppress incriminating evidence obtained from the warrantless entry of his residence. We disagree. Because defendant did not move for a new trial or a *Ginther*[5] hearing, we review his claim for errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Whether a defendant received ineffective assistance of counsel presents a question of constitutional law that we review de novo. *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012).

To establish ineffective assistance of counsel, a defendant must show that

> (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel's assistance was sound trial strategy. [*People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (citations omitted).]

The federal and state constitutions "prohibit unreasonable searches and seizures." *People v Antwine*, 293 Mich App 192, 194; 809 NW2d 439 (2011), citing US Const, Am IV; Const 1963, art 1, § 11. The state constitutional provision is usually construed consistent with the federal constitutional provision. *Id.* at 194-195. "Generally, a search conducted without a warrant is unreasonable unless there exist both probable cause and a circumstance establishing an exception to the warrant requirement." *People v Snider*, 239 Mich App 393, 407; 608 NW2d 502 (2000) (citation and quotation marks omitted).

Consent is one exception to the warrant requirement for a search. *People v Brown*, 279 Mich App 116, 131; 755 NW2d 664 (2008). "Generally, that consent must come from the person whose property is being searched or from a third party who possesses common authority over the property." *Id.* "'Common authority' is based 'on mutual use of the property by persons generally having joint access or control for most purposes . . . .'" *Id.*, quoting *United States v Matlock*, 415 US 164, 171 n 7; 94 S Ct 988; 39 L Ed 2d 242 (1974). However, even when a person does not have common authority to consent to a search, the search does not violate the Fourth Amendment if the searching officers nonetheless "reasonably believed" that the person

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[4] We need not address defendant's claim of ineffective assistance of counsel because the associated relief for that claim is the same relief that we are already granting, namely resentencing without the enhancement.

[5] *People v Ginther*, 390 Mich 436; 212 NW2d (1973).

had the authority to consent. *Illinois v Rodriguez*, 497 US 177, 189; 110 S Ct 2793; 111 L Ed 2d 148 (1990). Whether the officers reasonably believed that the person had the authority to consent is determined on the basis of the facts available to the officers when they entered the premises without a warrant. See *id*. at 185-186.

Here, an arresting officer's police report indicates that the victim provided officers with the key to the residence and requested that they arrest defendant. By these actions, the victim clearly consented to the search of the residence. However, we need not decide whether the victim had actual authority to consent to the search. Given that the victim gave officers a key to the residence, the officers could have "reasonably believed" that the victim had access to and control over the residence, and thus, in fact had actual authority to consent to the search. In addition, the officer understood that defendant was the victim's "soon to be or ex-husband," which would be consistent with a mutually possessed residence.

Defendant argues that the officers could not have reasonably believed that the victim had actual authority to consent because she had not lived in the residence for some time. However, reasonable belief is determined from the facts available to the officers at the time of the search. See *id.* There is nothing in the record to suggest that the officers were aware that the victim had not been living in the residence.

In short, our review of the record fails to establish that any challenge to the search would have been successful. As a result, defendant cannot prevail on his ineffective assistance of counsel claim. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) (noting that failure to raise a meritless argument or futile objection does not constitute ineffective assistance); *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002) ("If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue.").

III. PROSECUTORIAL MISCONDUCT

Defendant argues that reversal is warranted because of prosecutorial misconduct during trial or ineffective assistance based on the failure to object to the misconduct. We disagree. We review unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Rice (On Remand)*, 235 Mich App 429, 434; 597 NW2d 843 (1999). "Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial." *Id*. at 435. "Appellate review of alleged misconduct is precluded absent an objection, unless an objection would not have cured the prejudice." *People v McGhee*, 268 Mich App 600, 633-634; 709 NW2d 595 (2005).

Defendant argues that the prosecutor committed misconduct in three respects. First, he claims the prosecutor injected prejudicial innuendo into the trial by cross-examining defendant's mother about threats that he allegedly made against his children. Second, he claims the

prosecutor placed her own credibility at issue by offering to testify under oath that defendant's testimony was false. Third, he claims the prosecutor improperly vouched for the credibility of the victim during closing argument. Defendant further argues that defense counsel's failure to object to these instances of prosecutorial misconduct constituted ineffective assistance of counsel. Each argument will be addressed in turn.

A. THREATS

"A defendant's right to a fair trial may be violated when the prosecutor interjects issues broader than the guilt or innocence of the accused." *Rice*, 235 Mich App at 438. Additionally, "[a] prosecutor may not inject unfounded and prejudicial innuendo into a trial." *People v Dobek*, 274 Mich App 58, 79; 732 NW2d 546 (2007).

In this case, defendant elicited testimony from his mother on direct examination that "[h]e loved, he wanted his kids, he adores his kids. And his kids adore him." The testimony created the impression of a loving, healthy relationship. Thus, defendant initially placed his relationship with the children at issue. On cross-examination, the prosecution repeatedly asked defendant's mother whether defendant had ever threatened the children's lives. "The prosecution properly was permitted to pursue a full development of the question of defendant's [relationship] and to elicit testimony . . . to rebut the impression" of a normal, loving relationship. *People v Vanover*, 200 Mich App 498, 503; 505 NW2d 21 (1993). In other words, defendant "opened the door" to these questions. See *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994) (prejudicial testimony does not warrant reversal when the defendant "opened the door" to the testimony). Accordingly, no prosecutorial misconduct occurred.

B. OFFER TO TESTIFY

While a prosecutor is permitted to assert that a defendant's story is not credible, a prosecutor cannot premise the assertion on the prestige of the prosecutor's office. *People v Meissner*, 294 Mich App 438, 457-458; 812 NW2d 37 (2011).

During the cross-examination of defendant, the following exchange occurred:

> *Q*: You wanted to win a fight, right?
>
> *A*: No, I didn't want to fight. I wanted to win an argument over my kids. I wanted my children to be delivered to my house like they were suppose to have been the weekend before, I.
>
> *Q*: Do you have something else you wanted to share?
>
> *A*: No, ma'am. No, ma'am. At least I don't threaten my witnesses.
>
> *Q*: Either [sic] do I.
>
> *A*: Yeah, you do. I have Roger Stamper's wife's taped letter too and I have mailed that one off to the Attorney General's–

Q: Roger Stamper, another convicted wife beater?

A: Roger Stamper, yes. That's right. And you also threatened his wife and I mailed that letter off to the Attorney General.

I soon hope that you will be under investigation for threatening your witnesses.

[*THE PROSECUTOR*]: Judge, I want to make it completely clear to this Court that the allegations of Mr. Glover are completely untrue. If the Court wishes to place me under oath, I'll be happy to do it.

THE COURT: Just a minute. Let's move on with another question.

In this case, we agree that the prosecutor erred in offering to testify in response to defendant's allegation that she had threatened witnesses. The prosecutor directly stated that defendant's accusation was false, and she supported her statement by offering to personally testify under oath. In doing so, the prosecutor used the prestige of the prosecutor's office to support her statement that the accusation was false. Nevertheless, reversal is not warranted because defendant invited the response. *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003). "Under the doctrine of invited response, the proportionality of the response, as well as the invitation, must be considered to determine whether the error, which might otherwise require reversal, is shielded from appellate relief." *Id*. at 353. Defendant first raised the allegation that the prosecutor had threatened witnesses during defendant's direct examination of his mother. Defendant then raised the allegation again during his cross-examination. Because defendant repeatedly accused the prosecutor of threatening witnesses, he invited an emphatic denial from her. While the prosecutor's denial was not appropriate, the denial was understandable given in "the heat of argument" in the criminal trial. See *United States v Young*, 470 US 1, 10; 105 S Ct 1038; 84 L Ed 2d 1 (1985).

Moreover, defendant is not entitled to any relief because the prosecutor's response, though improper, was not so severe that a curative instruction would have been inadequate to cure any error. In fact, the trial court did instruct the jury that any questions, arguments, and comments by the attorneys were not evidence and were not to be considered, and jurors are presumed to follow their instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Consequently, we find that defendant was not deprived of a fair trial.

C. VOUCHING

A prosecutor may not vouch for the credibility of witnesses by implying that she has some special knowledge of the witnesses' truthfulness. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Nor can a prosecutor place the prestige of her office behind the testimony of witnesses. *McGhee*, 268 Mich App at 633. However, a prosecutor can argue that a witness is credible, especially when "the question of guilt depends on which witness the jury believes." *Thomas*, 260 Mich App at 455.

Defendant's argument that the prosecutor improperly vouched for the victim is meritless. The prosecutor did not indicate that she had any personal knowledge regarding the truthfulness of the victim. Instead, the prosecutor permissibly argued that, based on the evidence,[6] the victim had no reason to provide a false version of the events at issue, whereas defendant did have a reason to provide a false version, to wit, he was on probation at the time of the alleged assault. Therefore, we conclude that no prosecutorial misconduct occurred during closing argument.

D. INEFFECTIVE ASSISTANCE

Defendant alternatively argues that defense counsel was ineffective for failing to object to the identified instances of prosecutorial misconduct. We find no merit to these claims.

With respect to the prosecutor's cross-examination about the threats against the children, any objection would have been meritless because defendant opened the door to the cross-examination, and "it is not ineffective assistance of counsel to fail to make a meritless objection." *People v Comella*, 296 Mich App 643, 655; 823 NW2d 138 (2012).

With respect to the prosecutor's offer to testify that she had not threatened witnesses, failing to object did not fall below the objective standard of professional norms because it was a reasonable trial strategy not to object. See *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011) ("[T]his Court will not second-guess defense counsel's judgment on matters of trial strategy."). Here, the trial court stepped in immediately and put an end to the discussion, by directing the prosecutor to "move on" and ask her next question. Objecting at this point would only have served to prolong the situation after the trial court already resolved it, supporting our conclusion that trial counsel employed sound trial strategy. Moreover, even if counsel's failure to object could be construed as falling below an objective performance standard, defendant cannot establish any prejudice because an objection would have resulted at best in a cautionary instruction being given to the jury. Because the jury *was* instructed that the attorneys' statements were not evidence and not to be considered, and juries are presumed to follow their instructions, a cautionary instruction would not have produced any different result. *Abraham*, 256 Mich App at 279.

Finally, with respect to the prosecutor's alleged vouching, because the prosecutor did not vouch for the victim or otherwise improperly discuss the credibility of the witnesses, counsel's performance was not deficient by failing to object. See *Comella*, 296 Mich App at 655.

IV. CONCLUSION

We affirm defendant's convictions, but we vacate defendant's sentence and remand to the trial court for resentencing without the habitual offender enhancement. Additionally, the trial court should correct the clerical error on defendant's judgment of sentence to accurately reflect

[6] The prosecutor stated, "Let's go through and *take a look at the testimony* and see why [the victim's] testimony has the ring of truth. And why the testimony of [defendant] is nothing but an attempt to escape justice." (Emphasis added.)

that defendant was convicted of malicious destruction of property, value less than $200, MCL 750.377a(1)(d).

Affirmed in part, vacated in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder